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No. 81-2403

IN THE

# Supreme Court of the United States

October Term, 1981

MARILYN THRELKELD and DANIEL HANKA,
*Appellants,*

vs.

ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, AFL-CIO,
*Appellee,*

and

STATE OF MINNESOTA and MINNESOTA PUBLIC EMPLOYMENT RELATIONS BOARD,
*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

## MOTION TO DISMISS OF APPELLEES STATE OF MINNESOTA AND MINNESOTA PUBLIC EMPLOYMENT RELATIONS BOARD

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## QUESTION PRESENTED

Is a union required by the First and Fourteenth Amendments to the United States Constitution, prior to collecting a fair share fee from public employees it represents but who are not members of the representative, to prove: 1) the costs incurred in performing specific activities which are related to collective bargaining, contract administration and grievance adjustment and which resulted in actual benefits to dissenting employees; and 2) the propriety of the formula used to calculate the fee?

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## MOTION TO DISMISS OF APPELLEES STATE OF MINNESOTA AND MINNESOTA PUBLIC EMPLOYMENT RELATIONS BOARD

## MOTION TO DISMISS

Appellees, pursuant to Rule 16 of the Supreme Court of the United States, move to dismiss the appeal herein on the grounds that the questions presented are so insubstantial as not to need further argument.

## OPINION BELOW

The opinion of the Minnesota Supreme Court is reported at 316 N.W.2d 551 (Minn. 1982), and reproduced in the Appendix to Jur. Stat. (A. 5 to A. 7).[1]

## CONSTITUTIONAL PROVISIONS AND STATUTES

The applicable provisions of the First and Fourteenth Amendments to the United States Constitution are set forth by Appellants. (A. 129).

The statutory provisions under constitutional attack are the original and amended versions of Minn. Stat. § 179.65, subd. 2.[2] (State A. 1 to A. 2.)[3]

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[1] Throughout this motion, the abbreviation "Jur. Stat." means the Appellants' Jurisdictional Statement; the abbreviation "A. —" is a reference to the Appendix to the Jurisdictional Statement.

[2] Respectively, Minn. Stat. § 179.65, subd. 2, as enacted in 1973 Session Laws of Minnesota, ch. 635, § 10 and Minn. Stat. § 179.65, subd. 2, as enacted in 1976 Session Laws of Minnesota, ch. 102, § 2.

[3] Throughout this motion, the abbreviation "State A. —" is a reference to the Appendix to the Motion to Dismiss of Appellees State of Minnesota and Public Employment Relations Board.

## STATEMENT OF THE CASE

This is an appeal from the decision of the Minnesota Supreme Court upholding the constitutionality of both the original and amended versions of Minn. Stat. § 179.65, subd. 2. That statute permits a union representative of public employees to collect a service, or "fair share," fee from persons within a bargaining unit it represents but who are not members of the union.

Appellants Marilyn Threlkeld, an educational aide, and Daniel Hanka, a teacher, have been members of bargaining units in Independent School District No. 281 represented by Appellee Local 872 of the Robbinsdale Federation of Teachers ("RFT"). As non-members of the RFT, Appellants have been assessed fair share fees.

The Minnesota Public Employment Labor Relations Act ("PELRA") was amended in 1973 to permit the assessment of a fair share fee from employees who were part of a bargaining unit but who were not members of the unit's exclusive representative. Minn. Laws 1973, ch. 635, § 10 amending Minn. Stat. § 179.65, subd. 2 (1972). This original fair share fee provision authorized assessment of a fee "for services rendered by the exclusive representative" in an amount not to exceed "a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to the negotiations and administration of grievance procedures." Pursuant to the statute, the RFT sought to collect fair share fees from Appellants.

In November, 1974, Appellants instituted this action challenging the original fair share fee statute as violative of their rights to procedural due process. On August 13, 1975, the state district court ruled that the statute deprived the Appellants

of property without due process of law. (A. 91 to A. 107.) The Minnesota Supreme Court reversed the district court decision, construing the fair share fee statute to provide certain procedural safeguards which satisfied the requirements of due process. *Robbinsdale Education Association v. Robbinsdale Federation of Teachers Local 872*, 307 Minn. 96, 239 N.W.2d 437, *vacated on other grounds*, 429 U.S. 880 (1976). (A. 73 to A. 87.) Threlkeld and Hanka appealed to this Court.

Prior to a decision on that appeal, the Minnesota Legislature amended the original fair share fee statute. Minn. Laws 1976, ch. 102, § 2. (State A. 1 to A. 2.) The amendment, effective April 1, 1976, established additional procedural and substantive standards.

Procedurally, the amendment provided for "advance written notice" of the fair share fee assessment with the opportunity for the employee to file a challenge to the assessment "within 30 days after the receipt of the written notice." *Id.* Although the filing of a challenge would not delay the deduction of the fee from the earnings of the employee, the fee assessed the challenger would be held in escrow pending a decision on the employee's challenge. *Id.* At the challenge hearing conducted by the Minnesota Bureau of Mediation Services ("BMS"),[4] the burden of proof was placed upon the union to justify the amount of the fee. A challenger dissatisfied with the decision of the BMS was provided the opportunity to appeal the Bureau's decision to the Appellee Public Employment Relations Board ("PERB").[5]

Substantively, the 1976 amendment provided that the

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[4] The 1976 amendment also granted to the BMS the authority to hear and decide all issues in fair share fee challenges. Minn. Laws 1976, ch. 102, § 3.

[5] The 1976 amendment provided the PERB with the authority to hear appeals from the BMS relating to fair share fee challenges. Minn. Laws 1976, ch. 102, § 4.

amount of the fair share fee would be "equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative." Minn. Laws 1976, ch. 102, § 2. (State A. 1 to A. 2.) However, in no event could the fee exceed 85% of the regular membership dues. *Id.*

This Court vacated and remanded the decision of the Minnesota Supreme Court for further consideration in light of the 1976 amendment. *Threlkeld v. Robbinsdale Federation of Teachers*, 429 U.S. 880 (1976). The Minnesota Supreme Court remanded the action to the district court which, while retaining jurisdiction, remanded the action to the BMS for exhaustion of administrative remedies.

The BMS conducted three days of hearings on the challenges to the assessments under the 1973 and 1976 versions of the fair share fee statute. The fair share fee hearings were conducted in accordance with BMS Rule 104(c)(1)-(3) and (5)-(7). 8 MCAR § 2.154(e)(3). (State A. 3 to A. 4.) BMS Rule 104(c) provides that hearings will be conducted by a hearing officer who is required "to inquire fully into the facts in dispute, to call, examine, and cross-examine witnesses and to require the production of documentary or other evidence" as deemed necessary. A party has the right to appear at the hearing in person and to be represented by counsel, to present evidence and testimony, and to submit written arguments if deemed appropriate by the hearing officer. 8 MCAR § 2.104 (c). (State A. 3.)

At the hearing, the RFT introduced testimony and exhibits indicating the basis of the fair share fees assessed the Appellants. (A. 37, 47, 51.) Over two hundred pages of testimony were taken and witnesses included the treasurer of the RFT who had actually computed the fair share fees assessed Appel-

lants.[6] Although no discovery had been taken,[7] Appellants nevertheless had copies of the monthly Treasurer's Reports of the RFT which set forth the income and disbursements of the union and vigorously contested the fee assessments.[8]

On the basis of the substantial record accumulated in the hearings under both the original and amended versions of the fair share fee statute, the BMS concluded, both as to the original and amended versions of the fair share fee statute, that the RFT had met its burden of establishing the appropriate amount of the fair share fees assessed Appellants.[9]

In reaching its decision, the BMS applied the "residuum theory" or "residuum approach." The residuum approach is principally a procedural mechanism which assists the agencies in determining which costs may properly form the basis of an exclusive representative's fair share fee assessment. Under the residuum approach, the exclusive representative presents its case by itemizing the "member-only" benefits. Member-only benefits may include: (1) political expenses unrelated

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[6] Transcript of Hearing of 1 February 1978, Bureau of Mediation Services, at 34, 79; Transcript of Hearing of 20 November, 1978, Bureau of Mediation Services, at 18-19.

[7] The BMS denied the Appellants' request to pursue broad-ranging discovery against the RFT in part because the Appellants did not raise any specific issues but instead asserted a blanket challenge questioning whether they received *any* benefits from the RFT. The BMS concluded that it was the RFT, not the Appellants, which was the party that was forced to go to the hearing without notice. (A. 59 to A. 60.)

[8] *See* Transcript of Hearing of 1 February 1978, Bureau of Mediation Services, at 77-78. Indeed, prior to the second hearing regarding the amended version of the fair share fee statute, the RFT provided Appellants with documentation which included all monthly Treasurer's Reports of the RFT for the period April 1976 through October 1978. (A. 35.)

[9] Transcript of Hearing of 1 February 1978, Bureau of Mediation Services, at 54-55, 68, 78; Transcript of Hearing of 20 November, 1978, Bureau of Mediation Services, at 31-33.

to collective bargaining; (2) benefits, such as insurance and social meetings, which are available only to members of the exclusive representative; and (3) other benefits, such as charitable contributions and scholarships, which are unrelated to collective bargaining.[10] The exclusive representative then subtracts the costs associated with the member-only benefits from its total costs. The remainder, or "residuum," is the basis upon which the fair share fee is assessed.

The fee is calculated by determining the proportion of the costs associated with member-only benefits to total costs of the exclusive representative. The resulting proportion is then applied to the regular membership dues of the exclusive representative to determine the fair share fee amount. For example, if the costs associated with member-only benefits constitute 20% of the representative's total costs, the fair share fee would be 80% of the regular membership dues.[11] After calculating the fee, the exclusive representative must demonstrate the accuracy of the method used to determine the amount of the fee assessed.

A dissenting employee may rebut the representative's showing on the basis of the erroneous inclusion within the residuum of member-only benefits or on the basis of computational errors. The representative may respond to the employee's allegations and retains the ultimate burden of persuasion.

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[10] For example, member-only benefits for which Appellants were not assessed fair share fees included scholarships even though they were available to non-members. Transcript of Hearing, 1 February 1978, Bureau of Mediation Services, at 43.

[11] The amended fair share fee statute provides that if the costs associated with member-only benefits constitute 10% of the representative's total costs, the fair share fee nevertheless would equal only 85% of regular membership dues, because the amended fair share fee statute places a ceiling on the amount of the fair share fee assessment at 85% of dues.

The BMS found that, other than the member-only benefits enumerated by the RFT,[12] the expenditures of the RFT were within the residuum. The BMS concluded that the activities within the residuum "are an integral part of an employee organization and are essential if the employee organization is to provide the numerous services required by law of an exclusive representative." (A. 38, 52.)

Threlkeld and Hanka appealed the BMS decisions to the PERB.[13] At the request of Appellants, the PERB consolidated the two appeals. After briefs and oral argument were presented by the parties, the PERB unanimously affirmed the decisions of the BMS on December 6, 1979. (A. 21 to A. 31.)

The Appellants sought review of the PERB decision in state district court. On May 6, 1981, after full briefing and argument, that court held that the original and amended versions of the fair share fee statute, on their face and as applied, did not violate Appellants' constitutional rights and affirmed the PERB decision.

Appellants appealed the district court's decision to the Minnesota Supreme Court. That court affirmed the judgment of the district court in all respects.

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[12] These member-only benefits included political and ideological expenses, liability insurance available only to RFT members, publications, social expenses, scholarships and charitable expenses. (A. 38, 52.)

[13] The PERB consists of five members appointed by the Governor of the State of Minnesota with the advice and consent of the Senate. Two members are representative of public employees; two are representative of public employers; and one is representative of the public at large.

## ARGUMENT

**THE DECISION OF THE MINNESOTA SUPREME COURT IS PLAINLY CORRECT AND THE APPELLANTS' ARGUMENT TO THE CONTRARY FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION.**

Appellants' challenge to the constitutionality of the original and amended versions of the Minnesota fair share fee statute, Minn. Stat. § 179.65, subd. 2, does not raise issues of substantial constitutional dimension. Even if it did, their claims are foreclosed by prior decisions of this Court. Therefore, this appeal does not warrant further briefing and oral argument before this Court and should be dismissed.

Appellants contend that the original and amended versions of the Minnesota fair share fee statute violate the First and Fourteenth Amendments to the United States Constitution. Specifically, Appellants argue that, as a matter of constitutional law, an exclusive representative of public employees must, prior to assessing fair share fees on employees represented by but not members of the exclusive representative, prove:

1. The "specific activities" the representative performed negotiating under the Minnesota Public Employment Labor Relations Act (PELRA), Minn. Stat. §§ 179.61 *et seq.*;

2. The activities which may be constitutionally assessed dissenting employees under this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977);

3. The actual benefits a dissenting employee received from the activities which the representative may constitutionally apportion among all employees it represents;

4. The monetary costs the representative incurred in performing the activities that "demonstrably benefitted" dissenting employees; and

5. The formula for properly distributing the monetary costs among all employees represented by the exclusive representative.

Jur. Stat. at i-ii.

This Court's decisions make clear that the proof requirements Appellants seek to impose upon unions assessing a service fee are not mandated by the First Amendment. Moreover, this Court's decisions also make clear that a hearing prior to deduction of the service fee from wages is not required by the Fourteenth Amendment.

## I. PRIOR DECISIONS OF THIS COURT ESTABLISH THAT THE ORIGINAL AND AMENDED VERSIONS OF THE MINNESOTA FAIR SHARE FEE STATUTE COMPLY WITH THE REQUIREMENTS OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION BY REQUIRING A UNION TO EXCLUDE FROM FEES ASSESSED NON-MEMBERS COSTS OF BENEFITS AVAILABLE ONLY TO MEMBERS OF THE UNION.

Appellants contend that the First Amendment of the United States Constitution requires a union to meet burdensome proof requirements as a prerequisite to assessing a fair share fee. The union is said to be required to prove the specific activities it performed under PELRA, the benefits which specifically accrued to the dissenting employee, the costs the union incurred in providing the benefits, and the formula the union used to determine the assessed fee. Jur. Stat. at i-ii. Appellants allege that the original and amended versions of the Minnesota fair

share fee statute, on their face and as applied,[14] fail to meet these onerous proof requirements. Appellants' challenge, however, is precluded by prior decisions of this Court and therefore does not raise a substantial federal question. These prior decisions, *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956), *International Association of Machinists (IAM) v. Street*, 367 U.S. 40 (1961), *Brotherhood of Railway and Steamship Clerks, Freighthandlers, Express and Station*

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[14] Despite Appellants' challenge to the constitutionality of both the original and amended versions of the fair share fee statute on their face and as applied, Appellees State of Minnesota and PERB will focus primarily on the validity of the amended fair share fee statute as applied by the BMS, the PERB and the Minnesota courts. Although the statutory constructions of the administrative agencies and the Minnesota judiciary are clearly justified by the original and amended fair share fee statute, the statute nevertheless could be construed to comport even to Appellants' constitutional objections inasmuch as their objections relate primarily to the proof requirements imposed upon exclusive representatives attempting to assess a fair share fee. If any doubt as to the constitutionality of the Minnesota statute exists, the statute would have to be construed to avoid a finding of unconstitutionality. N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979); Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). Therefore, the facial validity of the original and amended fair share fee statute is apparent.

As to the validity of the original version of the fair share fee statute as applied by the Minnesota agencies and courts, the responses of Appellees State of Minnesota and the PERB are essentially the same as for the amended version of the statute. Where responses to the two versions of the statute diverge, they will be noted and treated separately.

Finally, Appellees State of Minnesota and PERB focus their responses on the amended fair share fee statute as applied because, although purporting to challenge the validity of the original and amended versions of the statute on their face and as applied, Appellants center their attack on the application of the amended statute. Indeed, the State and PERB are hard-pressed to ascertain any argument in the Jurisdictional Statement addressing the facial validity of the original and amended versions of the statute.

*Employees (BRAC) v. Allen*, 373 U.S. 113 (1963), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), will be addressed in turn.

In *Railway Employes' Department v. Hanson*, this Court held, among other things, that a federal statute authorizing a union shop agreement which required all employees of a railroad, as a condition of their continued employment, to become members of the union within sixty days and thereafter pay dues to maintain that membership did not violate the rights of dissenting employees to freedom of association. This Court observed:

> The financial support required relates . . . to the work of the union in the realm of collective bargaining. No more precise application of the union overhead to individual members seems to us to be necessary.

*Id.* at 235.

In *IAM v. Street*, 367 U.S. 740 (1961), the trial court found that union dues collected from dissenting employees pursuant to a union shop agreement authorized by federal statute were used "in substantial amounts" to finance campaigns of candidates whom they opposed and to promote political and economic doctrines with which they disagreed. The trial court concluded that this practice violated plaintiffs' rights of freedom of speech and deprived them of their property without due process of law. *Id.* at 744 n.2, 745 n.3 and 746 n.4.

This Court in *Street* did not directly address the constitutional issues decided by the lower court. *Id.* at 750. Instead, the federal statute was construed "to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." *Id.* at 768-69 (footnote omitted).

As to the appropriate remedies to be afforded a dissenting employee, this Court offered several observations. First, it

emphasized that any remedies should be granted only to employees who have made their objections known to the union:

> [D]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee.

*Id.* at 774. Second, the court recognized that any remedy must balance the interest of the dissenting employee with the interests of the union, the government and the public in avoiding "administrative difficulty" and "encroachment on the legitimate activities or necessary functions of the unions." *Id.* Finally, the Court suggested two possible remedies to protect these competing interests. The first remedy would be an injunction against expenditures for political causes opposed by each complaining employee of a sum of monies intended to be spent by the union for political purposes. A second remedy would be restitution to each complaining employee. The amount to be enjoined or refunded to the employee would be the portion of the employee's dues which equalled the proportion of the union's total expenditures on political activities to the union's total budget.[18] *Id.* at 774-75.

In *BRAC v. Allen*, 373 U.S. 113 (1963), this Court held that a dissenting employee is not required "to allege and prove each distinct union political expenditure to which he objects; it is enough that he manifests his opposition to *any* political expenditures by the union." *Id.* at 118. (Emphasis in original; footnote omitted.)

The *Allen* court also made several observations regarding remedies to be offered objecting employees. First, at least in the absence of special circumstances, preliminary or interim relief was not to be afforded dissenting employees until final

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[18] For example, if the union's total expenditures on political activities constituted one-fourth of the union's total budget, then one-fourth of the complaining employee's dues would be refunded.

judgment in their favor was entered. *Id.* at 120. Second, the Court refined the remedial observations made in *Street* by specifying the two substantive determinations required to fashion appropriate relief. These two determinations are: "(1) what expenditures disclosed by the record are political; (2) what percentage of total union expenditures are political expenditures." *Id.* at 121. Third, the Court placed the burden of proving the proportion of political to total union expenditures on the union. However, it recognized:

> Absolute precision in the calculation of such proportion is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise and no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters' such exactions in support of political activities.

*Id.* at 122. Finally, the Court suggested a practical remedy in which each dissenting employee would obtain a refund, apportioned on the same basis as the formula outlined in *Street*, as well as a reduction of such exactions in the future by the same proportion.[16] *Id.*

Any doubt as to the applicability of the principles of *Hanson*, *Street* and *Allen* to the public sector was resolved by this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In *Abood*, public school teachers challenged the validity of the agency shop clause authorized by a Michi-

[16] Recognizing the "difficulties in judicially administered relief," the Court further proposed that its suggested remedial plan could be achieved through an "internal union remedy" which provided "a simple procedure" to make the two-part determination required by the Court. *Id.* at 122-23.

gan statute which permitted an agency shop clause whereby every employee represented by a union, even though not a union member, was required to pay to the union a service charge equal in amount to union dues.

This Court issued a broad decision. First, the constitutionality of exclusive representation in and the applicability of the principles of *Hanson*, *Street* and *Allen* to the public sector were established. *Id.* at 224-32. Second, the Court held that the agency shop provision was constitutionally valid "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment." *Id.* at 225-26. Finally, the Court agreed with the dissenting teachers' contention that a union is constitutionally prohibited from spending a part of the required service fees to support an ideological cause "unrelated to its duties as exclusive bargaining representative." *Id.* at 234.

In reaching its decision, this Court recognized the need to balance the interest of employees who do not wish to associate with their exclusive representative against the central role the union shop performs in furthering labor peace and stability. The First Amendment interests of dissenting employees were found to be adequately protected by confining union expenditure of service fees to costs which "promote the cause which justified bringing the group together." *Id.* at 223, quoting *IAM v. Street*, 367 U.S. 740, 778 (1961) (Douglas, J., concurring). In the public sector, however, many costs which promote the cause of the group "may be properly termed political." *Id.* at 231. The Court resolved this question of whether service fees of dissenting employees could be used to fund political causes *related* to collective bargaining in the affirmative:

> Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective "political" can properly be attached to those beliefs [of dissenting employees] the critical constitutional inquiry.

*Id.* at 232. Indeed, the touchstone of the constitutional permissibility of the expenditure of service fees was whether those fees were applied to activities related to collective bargaining, contract administration and grievance adjustment. *Id.* Any expenditure of service fees, whether or not political in nature, was permissible if it were related to the promotion of the cause which justified bringing the group together.[17]

The original and amended versions of the Minnesota fair share fee statute, on their face and as applied, afford nonmember employees even greater protections than the constitutional safeguards established by the above-described line of decisions. First, although this Court's decisions permit nonmembers of a union to be assessed 100% of dues if all of the union's costs are related to collective bargaining, the amended Minnesota fair share fee statute limits the fair share fee assessment to 85% of regular membership dues even if the union's expenditures related to collective bargaining exceed 85% of its total costs. Second, even though a union may constitutionally spend funds not germane to its duties as exclusive representative if an employee does not affirmatively make his or her dissent known to the union, the 85% ceiling contained

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[17] This Court in *Abood* also discussed potential remedies for dissenting employees. It again recognized that "the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* at 237 (footnote omitted). The Court reiterated the proposed remedial processes and formulas stated in *Street* and *Allen*. *Id.* at 237-41.

in the amended Minnesota fair share fee statute ensures that a non-member employee is refunded at least 15% of regular membership dues even without affirmatively expressing his or her dissent. *IAM v. Street*, 367 U.S. 740, 774 (1961). Third, although this Court has prohibited the use of service fees of dissenting employees for ideological purposes unrelated to the union's role as exclusive representative, the Minnesota statute goes beyond this constitutional standard in protecting the rights of dissenting employees by prohibiting unions from assessing non-members any costs used to provide benefits available only to union members. Member-only benefits which cannot be assessed dissenting employees include benefits, such as publications and social events, which are available only to union members *even though those benefits may be related to the union's duties as exclusive representative.*[18] In short, the scope of costs which may be assessed dissenting employees under the original and amended versions of the Minnesota fair share fee statute is narrower than that mandated by the United States Constitution.

The original and amended versions of the Minnesota fair share fee statute also are in accord with this Court's guidelines regarding appropriate remedies to be afforded dissenting employees. The Minnesota fair share fee statute provides substantial protections to the First Amendment rights of dissenting employees while preserving the exclusive representative's ability to collect fair share fees and thereby promote labor peace and stability. First, in accordance with *BRAC v. Allen*, 373 U.S. 113, 120 (1963), the RFT's dissenting employees are not entitled to relief until final judgment in their

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[18] For example, publications distributed by the RFT to inform its members were construed to be member-only benefits because, even though related to the union's duties as exclusive representative, the publications were available only to members.

favor is entered. However, as an additional safeguard to the First Amendment interests of complaining employees, the amended fair share fee statute requires that the fees collected from employees who challenge the assessments will be placed in escrow in order to "avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Abood v. Detroit Board of Education*, 431 U.S. 209, 244 (1977) (Stevens, J., concurring).

Second, the residuum approach fully complies with this Court's definition of the substantive inquiry to be pursued to determine the appropriate amount of the agency shop or fair share fee. That inquiry is limited to two determinations: (1) what expenditures are unrelated to the union's duties as exclusive bargaining representative; and (2) what percentage of total union expenditures is unrelated to its duties as exclusive bargaining representative. *Abood v. Detroit Board of Education*, 431 U.S. 209, 239-40 (1977); *BRAC v. Allen*, 373 U.S. 113, 121 (1963). The residuum approach applied by the Minnesota agencies and courts requires the union to establish its member-only benefits[19] and the percentage of the total union budget which is devoted to member-only benefits. The calculation of the fair share fee is then determined, as suggested by this Court, by reducing the fee by the same proportion that expenditures for member-only benefits bear to the total budget of the exclusive representative. *Abood v. Detroit Board of Education*, 431 U.S. 209, 240 (1977); *BRAC v. Allen*, 373 U.S. 113, 122 (1963).

Finally, as required by this Court, the Minnesota fair share fee statute places the burden of establishing the appropriate amount of the service fee on the exclusive representative.

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[19] As noted above, the category of member-only benefits is even broader than activities unrelated to the union's duties as exclusive representative.

*Abood v. Detroit Board of Education*, 431 U.S. 209, 239 n.40 (1977); *BRAC v. Allen*, 373 U.S. 113, 122 (1963).

Despite this clear precedent, the Appellants attempt to fabricate several constitutional issues which are groundless in both fact and law. Appellants argue that, as a matter of constitutional law, a union must prove the costs incurred in performing specific activities which may be constitutionally assessed under *Abood* and which resulted in actual benefits to dissenting employees. Appellants further argue that the union must prove the formula used to calculate the fee. Jur. Stat. at i-ii. The constitutional requirements the Appellants seek to impose are foreclosed by prior decisions of this Court.

Appellants' principal premise is that a union must establish the actual benefits accruing to each dissenting employee. Such a requirement would impose such an onerous administrative and evidentiary burden on the union as to destroy its ability to collect the fair share fee. This Court has always been mindful of the need to protect the union from administrative burdens which would frustrate the legislative labor policies the fair share fee statute supports. *Abood v. Detroit Board of Education*, 431 U.S. 209, 237 (1977); *BRAC v. Allen*, 373 U.S. 113, 122 (1963); *IAM v. Street*, 367 U.S. 740, 774 (1961). Thus, this Court, far from requiring an exclusive representative to establish each specific activity which renders an actual benefit to each dissenting employee, has instead referred to the "benefits of union representation that necessarily accrue to all employees." *Abood v. Detroit Board of Education*, 431 U.S. 209, 222 (1977), citing *IAM v. Street*, 367 U.S. 740, 761 (1961), *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 415 (1976), and *NLRB v. General Motors*, 373 U.S. 734, 740-41 (1963). Moreover, to require an exclusive representative to establish demonstrable benefits accruing to dissenting employees would permit those employees to transform the proce-

dure for determining the appropriate amount of the fair share fee into a forum to question the wisdom and strategy of union expenditures contrary to this Court's determinations in *Abood* and *Street.*[20] *Abood v. Detroit Board of Education*, 431 U.S. 209, 222-23 (1977); *IAM v. Street*, 367 U.S. 740, 778 (1961) (Douglas, J., concurring). In sum, Appellants' contention that the union must establish actual benefits accruing to dissenting employees prior to assessing a fair share fee is completely foreclosed by prior decisions of this Court.[21]

Appellants further argue that an exclusive representative, prior to assessing a fair share fee, must prove the specific activities it performed meeting and negotiating under PELRA. Jur. Stat. at i. No such proof requirement has been imposed by this Court. Instead, this Court has suggested that only two determinations need be made: (1) what expenditures are unrelated to the union's duties as exclusive representative and (2) what percentage the expenditures unrelated to these duties constitute to total union expenditures. *BRAC v. Allen*, 373 U.S. 113, 121 (1963). *See also Abood v. Detroit Board of Education*, 431 U.S. 209, 238-40 (1977) and *IAM v. Street*, 367 U.S. 740, 774-75 (1961). The residuum approach applied to the

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[20] The absurdity of Appellants' position that demonstrable benefits must accrue to dissenting employees before a fair share fee may be assessed is demonstrated by its practical application. Apparently, under Appellants' theory, if a grievance filed by a dissenting employee is ultimately rejected by an arbitrator or the courts, no demonstrable benefit has accrued to that dissenting employee even though the union may have spent a substantial amount of money earnestly prosecuting the claim. This Court has already determined that a legislative body may constitutionally authorize the assessment of fair share fees for the precise purpose of preventing the "free ridership" which the Appellants' theory necessarily protects. See, e.g., Abood v. Detroit Board of Education, 431 U.S. 209, 221-22 (1977).

[21] *A fortiori*, an itemization of the costs incurred in providing such individualized benefits is also not required. *See* Jur. Stat. at ii.

original and amended versions of the Minnesota fair share fee statute embodies this Court's formula. Under the residuum approach, the sum of expenditures for activities unrelated to collective bargaining and expenditures for benefits available only to union members is determined. Then, the percentage of total union expenditures which member-only benefits compose is calculated. This strict adherence of the residuum approach to the guidelines established by this Court in *Street*, *Allen* and *Abood* utterly negates Appellants' contention that they have a constitutional right to an enumeration of each specific activity their exclusive representative performs under PELRA.[22]

Appellants next contend that the union must prove what formula is proper for distributing the costs of representation among all employees in the bargaining unit. Jur. Stat. at ii. Appellees State of Minnesota and PERB concur that the proper formula must be demonstrated. Even though the amended fair share fee statute clearly provides that fair share fees are to be assessed "in an amount equal to the regular membership dues of the exclusive representative, less the costs of benefits financed through the dues and available only to members of the exclusive representative," the BMS has nevertheless required the exclusive representative to demonstrate the accuracy of the method used to determine the amount of the fee assessed. Minn. Stat. § 179.65, subd. 2 (1980). Appellee RFT made the required showing in this case.[23] Thus, no issue

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[22] *A fortiori*, an exclusive representative is also not required to enumerate each activity which may be constitutionally assessed under Abood v. Detroit Board of Education, 431 U.S. 209 (1977). See Jur. Stat. at ii.

[23] *See* Transcript of Hearing of 1 February 1978, Bureau of Mediation Services, at 38-49; Transcript of Hearing of 20 November 1978, Bureau of Mediation Services, at 21-33; and Transcript of Hearing of 6 December 1978, Bureau of Mediation Services, at 6-11.

is presented for this Court's consideration regarding any constitutional requirement that the union demonstrate the propriety of the formula it used to distribute the costs of representation among all employees in the bargaining unit.

Appellants' contentions, taken as a whole, are an attempt to constitutionalize onerous proof requirements on the exclusive representative so that its ability to assess the fair share fee is effectively destroyed. This Court has been careful to avoid the dangers in imposing unreasonable burdens on unions' attempts to collect service fees lest the policies underlying union and agency shop arrangements be frustrated. *Abood v. Detroit Board of Education*, 431 U.S. 209, 237 (1977); *BRAC v. Allen*, 373 U.S. 113, 122 (1963); *IAM v. Street*, 367 U.S. 740, 774 (1961). This Court's concern precludes Appellants' contentions here.

In sum, Appellants fail to raise any issue of sufficient constitutional dimension[24] or merit to warrant further consideration by this Court. Therefore, their appeal should be dismissed.

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[24] Appellants often attempt to challenge the factual findings of the BMS which were affirmed by the PERB, state district court and the Minnesota Supreme Court. See, e.g., Jur. Stat. at 7, 13 n. 54, 19, 21. Appellees vigorously contest Appellants' factual representations. More importantly, however, Appellants' assertions raise merely factual, not constitutional, issues. This Court, absent exceptional circumstances not present here, "does not sit to retry issues of fact thus heard and determined by the properly constituted tribunals of the state." Portland R. Co. v. Railroad Commission, 229 U.S. 397, 412 (1913). See also Evco v. Jones, 409 U.S. 91, 94 (1972).

## II. PRIOR DECISIONS OF THIS COURT SHOW THAT THE ORIGINAL AND AMENDED VERSIONS OF THE MINNESOTA FAIR SHARE FEE STATUTE COMPLY WITH THE REQUIREMENTS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY PROVIDING AN EMPLOYEE CHALLENGING A FAIR SHARE FEE ASSESSED NON-MEMBERS OF THE UNION AN OPPORTUNITY TO BE HEARD PRIOR TO THE UNION RECEIVING THE FEE.

Appellants argue that the original and amended versions of the Minnesota fair share fee statute violate the Fourteenth Amendment in several respects. First, they assert that the statute creates an irrebuttable presumption Jur. Stat. at 12-14. Appellants next contend that the "method of calculating" the fair share fee impermissibly delegates the power of taxation to private groups. *Id.* at 17-19. Finally, Appellants argue that the Minnesota statute does not provide due process to dissenting employees. None of these allegations raises a substantial constitutional issue.

Appellants contend that the residuum approach applied by the Minnesota agencies and courts creates an irrebuttable presumption that each service, other than member-only benefits, provided by an exclusive representative "specifically relates to negotiations and grievance-adjustment, or that every service so related necessarily benefits each employee." Jur. Stat. at 13 (footnotes omitted). The residuum approach, however, irrebuttably presumes neither that all costs within the residuum specifically relate to a union's duties as exclusive representative nor that those incurred costs necessarily benefit each employee.[25]

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[25] Appellants' contention that the Constitution requires that an exclusive representative demonstrate an actual benefit accruing to each employee has, as established above, no merit under prior decisions of this Court. See Abood v. Detroit Board of Education, 431 U.S. 209, 222 (1977) and IAM v. Street, 367 U.S. 740, 761 (1961).

Any presumption contained in the residuum approach is not irrebuttable.[26] The Appellants admit that they are provided the opportunity to prove additional member-only benefits and to attack the costs attributed by the union to member-only benefits. Jur. Stat. at 14. In sum, even if the residuum approach is construed to embody a presumption, that presumption is clearly not irrebuttable.[27]

Appellants' second contention under the Fourteenth Amendment is that the Minnesota fair share fee statute has impermissibly delegated the power of taxation to private groups. Jur. Stat. at 17-19. Appellants' argument utterly ignores the common-sense definition of a tax as an assessment imposed by government to obtain revenue for its operation. It is well-settled that:

> A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government.

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[26] To the extent the residuum approach may be construed to embody a presumption that costs within the residuum are related to collective bargaining, that presumption reflects a reasonable legislative judgment that a union exists for the very purposes of collective bargaining, contract administration and grievance adjustment and, after member-only benefits are removed, the residuum reflects the costs the union incurs in fulfilling its purposes. This Court has stated that it is not within its province to question the wisdom of that judgment. Abood v . Detroit Board of Education, 431 U.S. 209, 224-25, 229 (1977); Railway Employes' Department v. Hanson, 351 U.S. 225, 233-34 (1956).

[27] Indeed, it would appear that the only irrebuttable presumptions contained in the Minnesota fair share fee system are that a union never expends greater than 85% of its funds on services related to its duties as exclusive representative and that every employee who is not a member of the union objects to at least 15% of the union's expenditures which are unrelated to collective bargaining.

*United States v. Butler*, 297 U.S. 1, 61 (1936). The fair share fee is neither imposed by the State of Minnesota nor does it raise revenue for the State's operation. Thus, this case presents no constitutional issue for this Court's consideration regarding the delegation of the State's power of taxation.

Finally, Appellants assert that the Minnesota fair share fee statute does not comply with procedural due process standards because it does not require a hearing *prior* to the deduction of the fair share fee from a dissenting employee's wages. Jur. Stat. at 19-22. Once again, Appellants fail to present a substantial constitutional question for this Court's consideration.

Appellants' procedural due process claims are foreclosed by this Court's decision in *BRAC v. Allen*, 373 U.S. 113 (1963). In *Allen*, the Court reversed a decree granting dissenting employees interim relief from compliance with financial obligations imposed by a collective bargaining agreement. *Id.* at 120. The Court stated:

> We think that lest the important functions of labor organizations under the Railway Labor Act be unduly impaired, *dissenting employees* (at least in the absence of special circumstances not shown here) *can be entitled to no relief until final judgment in their favor is entered.* Therefore, on remand respondents should be given a reasonable time within which *they must pay to the bargaining representative* of their class or craft *all sums required under the Agreement, including arrears, that are owing*; as to any respondent failing to do this, the action must be dismissed.

*Id.* In short, this Court has concluded that the interest of industrial peace furthered by ensuring adequate financial support for employee representatives outweighs the interest of

dissenting employees to withhold payment of their fair share fees.

The correctness of the *Allen* decision is clearly established by later decisions of this Court. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court observed that due process "is flexible and calls for such procedural protections as a particular situation demands." *Id.* at 334. In determining when and what process is due, three factors are considered:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 335.

The private interest affected by the deduction of a fair share fee prior to a hearing is minimal. The monetary amount of the fee assessment is small.[28] Given that *some* amount of the fee is certainly proper, any potential wrongful deprivation is only a fraction of this small amount. Moreover, if the assessment is determined to be incorrect, the dissenting employee will be deprived of this minimal monetary amount only temporarily. In the interim, fees deducted are placed in escrow so that the challenger's funds will not "be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Abood v. Detroit Board of Education*, 431 U.S. 209, 244 (1977) (Stevens, J., concurring).

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[28] For example, Appellant Threlkeld was never assessed more than $4.00 per month for only ten months per year. (A. 24.)

The risk of an erroneous deprivation of the small fee amount is slight. The Minnesota Legislature has determined that public employees represented by a union may be assessed a fair share fee. The Legislature has further determined that this fee may never exceed 85 percent of the union's regular membership dues. Given that the member-only benefits normally do not exceed fifteen percent of dues, the risk that an employee will be erroneously deprived of the fee is not substantial.

A pre-deduction hearing would offer little additional protection to the dissenting employee. The automatic escrow of challenged assessments protects the dissenting employees' First Amendment interest in withholding the support from ideological activities he or she opposes. Hence, the only advantage of a pre-deduction hearing is the avoidance of a temporary deprivation of a small portion of the fair share fee. The "fiscal and administrative burdens" that the pre-deduction hearing would entail outweigh the employees' minimal interest in a pre-deduction hearing.[29] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The governmental interest in authorizing deduction of fair share fees prior to a hearing is substantial. This Court has recognized the governmental interest in ensuring that unions receive funds from members and non-members sufficient to carry out their legal duties:

> The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in set-

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[29] These burdens would be particularly onerous in that Appellants insist that a judge conduct this preliminary review. Jur. Stat. at 20. Such a requirement is directly contrary to this Court's desire to avoid judicial entanglement in this remedial process. *Abood v. Detroit Board of Education*, 431 U.S. 209, 240 (1977); *BRAC v. Allen*, 373 U.S. 113, 122 (1963).

> tling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged "fairly and equitably to represent all employees . . ., union and nonunion," within the relevant unit.

*Abood v. Detroit Board of Education*, 431 U.S. 209, 221 (1977) (citations omitted). Failure to permit deduction of fair share fees pending the determination of the appropriate amount of the assessment would impair the union's ability to collect an assessment that is deemed proper.[30] The union's inability to obtain fees properly due it could undermine the state's interest in promoting the financial stability of exclusive representatives so that they may adequately perform their statutory duties. *See, e.g.*, Minn. Stat. §§ 179.61(2) and (3); 179.63, subds. 5, 16 and 18; 179.65, subd. 4; and 179.68, subd. 3(3) (1980).

In sum, Appellants' contentions are insufficient to raise a substantial constitutional question. The original and amended versions of the Minnesota fair share fee statute, on their face and as applied, do not create any irrebuttable presumptions, do not delegate the State's power of taxation to private groups, and do not deny dissenting employees' rights to procedural due process.

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[30] For example, the challengers may have left their employment or moved out of the area.

## CONCLUSION

For the reasons stated herein, the appeal should be dismissed for failure to present a substantial federal question.

Respectfully submitted,

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# APPENDIX

Original "fair-share" provision, Minn. Stat. § 179.65, subd. 2, as enacted in 1973 Session Laws of Minnesota, ch. 635, § 10:

Public employees shall have the right to form and join labor or employee organizations, and shall have the right not to form and join such organizations. Public employees in an appropriate unit shall have the right by secret ballot to designate an exclusive representative for the purpose of negotiating grievance procedures and the terms and conditions of employment for such employees with the employer of such unit. Except for employees included in Section 179.63, subdivision 10, clause (c), who shall be exempt from contributing until January 1, 1975 only, all public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative, and the employer upon notification by the exclusive representative of such employees shall be obligated to check off said fee from the earnings of the employee and transmit the same to the exclusive representative. In no instance shall the required contribution exceed a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures.

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Amended "fair-share" provision, Minn. Stat. § 179.65, subd. 2, as enacted in 1976 Session Laws of Minnesota, ch. 102, § 2:

Public employees shall have the right to form and join labor or employee organizations, and shall have the right not to form and join such organizations. Public employees in an appropriate unit shall have the right by secret ballot to designate

an exclusive representative for the purpose of negotiating grievance procedures and the terms and conditions of employment for such employees with the employer of such unit. All public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative in an amount equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative, but in no event shall the fee exceed 85 percent of the regular membership dues. The exclusive representative shall provide advance written notice of the amount of the fair share fee assessment to the director, the employer and to a list furnished by the employer of all employees within the unit. A challenge by an employee or by a person aggrieved by the assessment shall be filed in writing with the director, the public employer, and the exclusive representative within 30 days after receipt of the written notice. All challenges shall specify those portions of the assessment challenged and the reasons therefor but the burden of proof relating to the amount of the fair share fee shall be on the exclusive representative. The employer shall deduct the fee from the earnings of the employee and transmit the fee to the exclusive representative 30 days after the written notice was provided, or, in the event a challenge is filed, the deductions for a fair share fee shall be held in escrow by the employer pending a decision by the director pursuant to Section 179.71, subd. 2.

8 MCAR § 2.104 Investigation and Hearings on a Petition for Determination of Appropriate Unit.

* * * * *

(c) Hearing on Petition for Determination of Appropriate Unit. The hearing shall be conducted by a hearing officer with a reporter making a stenographic record of the proceeding. The hearing will be conducted as follows:

(1) All hearings shall be public meetings except when otherwise provided by the Director.

(2) It shall be the duty of the hearing officer to inquire fully into the facts in dispute, to call, examine, and cross-examine witnesses and to require the production of documentary or other evidence as he may deem necessary to fully acquaint himself with all facts relating to the case.

(3) Any party shall have the right to appear at the hearing in person or be represented by an agent to present pertinent evidence and testimony that is competent, relevant and material to the issues.

(4) The public employer shall provide the names and job classifications of employees within the suggested appropriate unit and make available such information to all parties submitting a 30% showing of interest.

(5) Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, shall be stated orally, together with a statement of the grounds of such objection and included in the stenographic record of the hearing. No objection shall be deemed waived by further participation in the hearing.

(6) The hearing officer may adjourn the hearing from day to day or from time to time and from place to place as he may deem proper upon appropriate notice thereof to the parties to the proceeding.

(7) At the close of the hearing, the hearing officer, may allow the parties to submit written arguments. The hearing officer shall fix the time for the filing of the arguments.

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8 MCAR § 2.154 Challenge of a Fair Share Fee Assessment.

(a) A petition asserting a challenge to a fair share fee assessment by an employee(s) or person(s) aggrieved by the assessment shall be filed in person or by certified mail with the Director. Such petition shall be in writing in the form prescribed and obtainable from the Bureau.

* * * * *

(e) Upon receipt of such a petition the Director shall investigate to determine if sufficient evidence on or concerning the question of the circumstances or the amount of the fair share fee assessment exists. If the Director determines that sufficient evidence exists:

* * * * *

(3) he shall conduct a hearing in accordance with BMS 104(c), (1)-(3) and (5)-(7). Hearings may be combined as deemed appropriate and notice of any such hearings will be served on the challenger(s), the exclusive representative and the employer.

(f) The Director shall decide the issues in a fair share fee challenge hearing on the basis of the record in accordance with BMS 104(d), but the burden of proof relating to the amount of the fair share fee shall be on the exclusive representative. The decision and order shall be issued to the parties and take effect 10 days after issuance unless appealed to the Board.